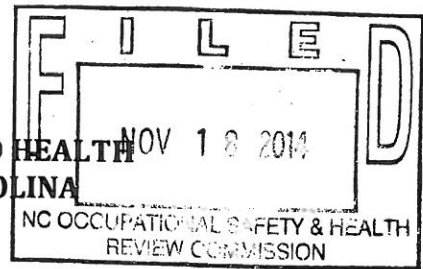


**BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA**



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

SOUTHERN INDUSTRIAL
CONSTRUCTORS INC.
and its successors

RESPONDENT.

DOCKET NO. OSHANC 2012-5404
OSHA INSPECTION NO. 316365261
CSHO ID NO. A6044

ORDER OF THE COMMISSIONERS

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 15th day of September 2014, Lee House, 422 North Blount Street, Raleigh, North Carolina, by Oscar A. Keller, Jr., Chairman, Dr. Richard G. Pearson, and Arlene K. Edwards, Members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Jason Rosser, Assistant Attorney General; North Carolina Department of Justice, Raleigh, North Carolina.

Respondent: Jay M. Wilkerson, Raleigh, North Carolina.

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission affirms the Order of Hearing Examiner Peebles.

ISSUE PRESENTED

WHETHER THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE SUPPORTED BY THE EVIDENCE?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

Citation One Item One

29 CFR 1926.21(b)(2)

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Citation One Item Two

29 CFR 1926.95(a)

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Citation One Item Three

29 CFR 1926.416(a)(3)

Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise

employees of the location of such lines, the hazards involved, and the protective measures to be taken.

FINDINGS OF FACT

1. This case was initiated by a Notice of Contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act N.C. Gen. Stat § 95-128.
4. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
5. Between May 8 and May 25, 2012, Compliance Safety and Health Officer Howard Laurie (CSHO Laurie) inspected Respondent's worksite at International Paper in Riegelwood, NC on the basis of an accident that occurred on May 2, 2012, as a result of an arc flash.
6. As a result of the recommendations of the compliance officer, on October 26, 2012, the Complainant issued citations to the Respondent.
7. The Commission adopts the Hearing Examiner's Findings of Facts 5-64.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order.
2. The Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act. N.C. Gen. Stat § 95-128.
4. Respondent has raised the defense of isolated employee misconduct, which is an affirmative defense. Respondent has failed to prove the defense. To establish the defense, the employer must establish the following:

There were three items in question. Citation One, Item One was a serious violation of 29 CFR 1926.21(b)(2), setting forth that employees were not instructed to use electrical arc flash protective equipment. The Hearing Examiner affirmed this citation. Her ruling is supported by several pieces of evidence including the testimony of the CSHO Laurie that training given to workers did not include arc flash protective PPE usage. Also, two Safety Task Assignment forms were introduced into evidence; and neither of those had the box checked to require ARC personal protective equipment (PPE). There was testimony about voltage testing at times other than the accident. Citation One, Item Two was a violation of 29 CFR 1926.95(a), stating that employees did not wear and were not provided with appropriate PPE. This item was also affirmed by the Hearing Examiner. Her ruling was supported again by evidence such as the testimony of CSHO Laurie and the two exhibits of the Safety Task Assignment forms. Citation One, Item Three was a violation of 29 CFR 1926.416(a)(3) stating that the employer did not meet its duty to warn employees of dangers. The Hearing Examiner affirmed this citation based on the testimony of the CSHO, the Safety Task Assignment forms, and testimony of Southern Industrial Employees. Neither of the Safety Task Forms stated that there was an energized bus bar in the area.


The Hearing Examiner's findings of fact and conclusions of law were supported by the evidence.

ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's December 10, 2013, Order in this case be, and hereby is, **AFFIRMED**, to the extent that it is not inconsistent with this opinion. Respondent is further **ORDERED** to abate the violations and to pay the assessed penalty of \$5,600 for Citation 1, Item 2 and \$5,600 for Citation 1, Item 2 and \$6,300 for Citation 1, Item 3 within 30 days of the filing date of this Order.

This the 18th day of November, 2014.


OSCAR A. KELLER, JR., CHAIRMAN


RICHARD G. PEARSON, Ph.D., MEMBER


ARLENE K. EDWARDS, MEMBER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER, upon:

JAY M WILKERSON
CONNOR GWYN SCHENCK PLLC
PO BOX 30933
RALEIGH NC 27622

by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

JASON ROSSER
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH NC 27602-0629

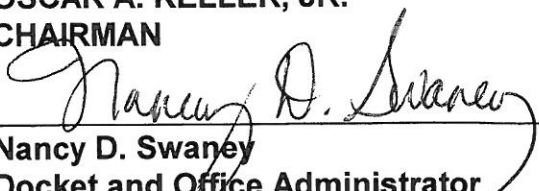
by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 18th DAY OF November 2014.

OSCAR A. KELLER, JR.
CHAIRMAN


Nancy D. Swaney
Docket and Office Administrator
NC Occupational Safety & Health Review Commission
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